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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 77.

FREDERIC P. OLCOTT, CHARLES M. McGHEE, FREDERICK D. TAPPAN, GEORGE WARREN SMITH, AND EDMUND W. CORLIES, APPELLANTS,

vs.

O. B. HEADRICK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED AUGUST 16, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 77.

FREDERIC P. OLCOTT, CHARLES M. McGHEE, FREDERICK D. TAPPAN, GEORGE WARREN SMITH, AND EDMUND W. CORLIES, APPELLANTS,

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1891.

1 Be it remembered that at a circuit court of the United States began and held for the northern division of the eastern district of Tennessee, at the Federal court-rooms, in the city of Knoxville, within said district and the sixth circuit, on the second Monday, it being the 9th day, of July, A. D. 1888—present and presiding, the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee—the following proceedings were had, to wit:

TUESDAY MORNING, *July 10th*, 1888.

Court met pursuant to adjournment.

Present and presiding: The Honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit, and the Honorable D. M. Key, judge of the United States district court for the eastern and middle districts of Tennessee.

2

THE CENTRAL TRUST COMPANY OF NEW YORK *vs.* EAST TENNESSEE, VIRGINIA & GEORGIA RAILROAD COMPANY *et als.*	In Equity. No. 787. Decree on Petition of O. B. Headrick.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the exceptions of Henry Fink, receiver, and the purchasers to the report of the special master, filed January 9th, 1888, be overruled, and that said report be confirmed, and the damages sustained by petitioner, O. B. Headrick, by reason of the injuries received and suffered by him on account of the negligence of the receiver, his agents and employees, as alleged in his petition and shown in said report, *was* assessed by the court at the sum of five hundred dollars. It is therefore adjudged by the court that the petitioner, O. B. Headrick, on account of the injuries aforesaid, have and recover of Henry Fink, receiver

3 in this cause, said sum of five hundred dollars and the costs of the proceedings upon his said petition, including a fee of thirty dollars to Lewis Tillman, special master, which is hereby allowed him for taking proof and making report thereon; but, it appearing that said Henry Fink, receiver, has been discharged from further liability in this cause and that the purchasers of the railroad property sold in this cause, to wit, Frederick P. Olcott, Charles M. McGhee, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, took said property subject to and that they assumed to pay any and all claims and demands, of whatsoever nature, incurred by said Henry Fink, receiver.

It is therefore ordered and decreed that said purchasers above named pay said sum of five hundred dollars to said petitioner, O.

B. Headrick, or his counsel of record, H. H. Ingersoll, or to
4 the clerk of this court for petitioner, and also pay all costs adjudged as aforesaid within thirty days from this date, and in default thereof the clerk will issue execution against said purchasers for said judgment and costs.

And a lien is hereby declared on the foregoing recovery in favor of H. H. Ingersoll, counsel for petitioner, to secure his reasonable fees as counsel in this cause on behalf of petitioner.

5 UNITED STATES OF AMERICA,
Eastern District of Tenn., Northern Division.

At a circuit court of the United States begun and held at Knoxville, for the eastern district of Tennessee, on Monday, the 9th day of July, 1888.

Present: the Hon. Howell E. Jackson, circuit judge, and Hon. D. M. Key, district judge.

CENTRAL TRUST COMPANY OF NEW YORK
vs.
1, EAST TENN., VA. & GA. R. R. COMPANY;
2, The Tenn. State Line R. R. Company;
3, Samuel Thomas, Defendants.

In Equity. No. 787.
Intervening Pet'n of O. B. Headrick.

This bill was filed to foreclose a mortgage given on the 15th day of June, 1881, by said East Tenn., Va. & Ga. Railroad Company to said complainant upon its property, rights, franchises, etc., situated in the States of Tennessee, Georgia, Alabama, and Mississippi. Upon the filing of said bill Henry Fink was, on the 6th day of Jan'y, 1885, appointed receiver in said cause, and was placed in possession of the whole of said railroad company's property. Afterwards, during the progress of said cause, to wit, on the 2nd day of March, 1887, an intervening petition was filed in said cause by O. B. Headrick, in substance as follows:

That petitioner, on the 30th day of March, 1886, was a passenger upon one of the trains of said railroad operated by said receiver, and while such a passenger, without fault on his part, but through the negligence and gross carelessness of the agents and employees of said receiver, petitioner was seriously injured by reason of a collision of a locomotive engine and tender with the train upon which petitioner was a passenger, resulting in injury to his left arm and permanent disability thereof.

6 Said petitioning intervenor prayed the court for a judgment of damages for said injuries, and that the same might be paid out of one or the other of the following funds alleged to be in the custody of the court and still undistributed:

1st. The fund resulting from the operation of the road by the receiver and hitherto unappropriated.

2nd. The funds hitherto in the hands of the receiver, which have been by him diverted from the expenses of the receivership and appropriated to the payment of the bonded indebtedness of the rail-

road company, defendant, and to the purchase of rolling stock for and the permanent improvement of said railroad property.

3rd. The funds resulting from the operation of said railroad by said receiver, which were turned over to the purchasers of said railroad under the sale ordered thereof by this court in this cause.

4th. The obligation of the purchasers to pay for and discharge all the liabilities and obligations of the receiver on all accounts as a part of the terms of their purchase of the property.

To this petition of the said intervenor the parties entitled to defend the same, by permission of the court, plead as a defense to said petition that petitioner's right of action, if any, was barred by the terms and provisions of the decree of sale and the decree confirming the sale, for the reason that said petition was not filed until after the lapse of six (6) months after the date of the decree confirming the sale.

The case came on to be heard at this term upon the said intervening petition of said O. B. Headrick, and there occurred as questions upon the argument and hearing of said petition and the defense thereunto before the said circuit court, said two judges presiding, the following:

1st. Whether or not petitioner was entitled to file said petition in said cause after the lapse of more than six (6) months after the entry of the decree confirming sale.

7 2nd. Whether or not under the decrees of sale and confirmation of sale plaintiff's action was barred.

3rd. Whether or not the purchasers of the property were liable for any claim against the receiver presented to the court more than six (6) months after the decree of confirmation of the sale.

Upon said petition and the defense thereunto judgment was awarded for the said O. B. Headrick upon the aforesaid questions of law by said circuit judge; whereupon an appeal by certificate of division was prayed for and granted in open court to the purchasers, to wit, Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies.

Upon all of which aforesaid questions of law the opinions of said judges were opposed; whereupon, on motion of said purchasers, by their solicitors, Wm. M. Baxter and Henderson & Jourolmon, that the points on which the disagreement hath been made during the present term be stated under the direction of the judges and certified, under seal of court, to the Supreme Court of the United States to be finally decided, it is ordered that the foregoing statement of the pleadings and the following statement of facts, which is made under the direction of the judges, be certified, according to the request of said purchasers, by their solicitors and the law in that case made and provided, to wit:

1st. The consolidated mortgage so as aforesaid foreclosed was made and delivered on the 15th day of June, 1881, by the said East Tenn., Va. & Ga. Railroad Company to the said complainant to secure an issue of $22,000,000.00 of 5 per ct. mortgage bonds; upon which default being made in the payment of interest, this bill was filed to foreclose the same on the 6th day of Jan'y, 1885.

2nd. The receiver in this case was appointed on the 6th day of Jan'y, 1885, and took possession of the aforesaid mortgaged premises on the 7th day of Jan'y, 1885.

3rd. The foreclosure of said mortgage was decreed by this
8 court in this cause on the 18th day of March, 1886. A sale of the mortgaged premises, to wit, the said East Tenn., Va. & Ga. railroad and its appurtenances in the States of Tennessee, Georgia, Alabama, and Mississippi, was made by the special master on the 25th day of May, 1886, and duly reported to the court, and a decree confirming said sale was made on the 28th day of June, 1886. By the terms of said decree of sale it was provided: "And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy, and discharge any and all claims now pending and undetermined in either of said courts, accruing prior to the appointment of the receiver herein or during the receivership, which may be allowed and adjudged by this court as prior in right to said respective mortgages, together with such interest as may be allowed, except as to mortgages prior to said mortgages foreclosed in this suit, and subject to which said property shall be sold; and also upon the further express conditions that he or they will pay off, satisfy, and discharge all debts, claims, and demands, of whatsoever nature, incurred or which may hereafter be incurred by said receiver, Henry Fink, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors or assigns, shall have the right to appear and make defense to any claim, debt, or demand sought to be enforced against said property; and said purchaser or purchasers, their successor or successors or assigns, shall also have the right to enter appearance in this or any other court and contest any claim or demand pending and undetermined at the date of the confirmation of such sale. All claims, debts, and demands accruing during the receivership herein shall be barred, unless presented, as herein provided, within six months after the confirmation of said sale; and jurisdic-
9 tion of this cause is retained by this court for the purpose of enforcing the provisions of this article of this decree."

In the report of the special master it appears and is recited that "In obedience to the decree entered herein on the 18th day of March, 1886, and the supplemental decree dated the 26th day of April, 1886, entered in the above cause, and the order dated May the 19th, 1886, the undersigned, as special master, begs leave to report that after having advertised, as required by said decrees, he did, on the 25th day of May, 1886, expose all of the said property described in said decrees and in the mortgages sought to be foreclosed in said suit to public sale, at the door in front of the custom-house building, in Knoxville, Tenn., upon the terms and conditions prescribed in said decrees. At said sale the said property, as described in said decrees and mortgages, was bid off by Frederic P. Olcott, Charles M. McGhee, Robert Fleming, Frederick D. Tappan,

George Warren Smith, and Edmund W. Corlies for the sum of ten million two hundred and fifty thousand dollars, one hundred thousand dollars of which sum was paid him in cash, in hand; and the same is subject to the order of the court."

And in said decree of confirmation it was recited that "this cause came on further to be heard upon the application of the complainant, The Central Trust Company of New York, to confirm the sale made under the decree and supplemental decree herein on the 25th day of May, 1886, by Wm. Rule, Esq., special master appointed for the purpose by the said decree of this court, to Frederic P. Olcott, Charles M. McGhee, Robert Fleming, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, acting as a committee on behalf of the bondholders, as purchasing trustees; and upon producing the report of said sale made by the said special master, which was filed on the 26th day of May, 1886, and no exceptions to said report having been filed, and sufficient notice of the hearing of the said application having been given to the solicitors of the parties to this cause, and the court having fully examined the report of the sale of the said special master and his doings in pursuance of the decree of sale herein, and finding the same correct and in all respects in conformity to law and with the orders and decrees of this court, * * * it is now, therefore, ordered, adjudged, and decreed that the said sale be, and the same is hereby, ratified, approved, and confirmed in all respects, and the said report of sale made by the said special master and all the proceedings of the said special master in that regard be, and the same are hereby, in all respects approved and confirmed."

"And it is further ordered, adjudged, and decreed that the said Wm. Rule, Esq., the special master herein, forthwith make and execute a proper instrument, in writing, conveying to the said Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, acting as a committee on behalf of the bondholders, as purchasing trustees, or to their assigns, as joint tenants and not as tenants in common, all and singular the property, premises, rights, and franchises described in the decree of sale heretofore entered in this cause by this court on the 18th day of March, 1886." * * *

"And it is further ordered, adjudged, and decreed that the said purchasers shall take the said property, and that *that* it be recited in said deed that they do take the said property subject to and that the said purchasers assume and pay off any and all debts, claims, and demands of whatsoever nature now pending and undetermined in either of the courts in which the original and ancillary bills in this cause are pending, which may be allowed and adjudged by this court or either of said courts where ancillary bills are pending as prior to any right secured under the said consolidated first mortgage, under foreclosure of which the said sale was made, and subject likewise to all debts, claims, and demands of whatsoever nature incurred by Henry Fink, as receiver in this cause, and which may remain unpaid at the termination of said Fink's receivership."

11 By reason of said opposing opinions of said two judges on the aforesaid questions of law arising in this cause, made by the said defenses to said intervening petition of said O. B. Headrick, said judges have caused this certificate of division to be signed and placed of record, in open court, on this the 11th day of July, A. D. 1888.

HOWELL E. JACKSON,
Circuit Judge.
D. M. KEY, *District Judge.*

12 WEDNESDAY, *July 11th*, 1888.

Court met pursuant to adjournment.

Present and presiding: The Honorable Howell E. Jackson, judge of the United States circuit court for the sixth judicial circuit, and the Honorable D. M. Key, judge of the United States district court for the eastern & middle districts of Tennessee.

THE CENTRAL TRUST COMPANY OF NEW YORK *vs.* EAST TENNESSEE, VIRGINIA & GEORGIA R.R. Co. *et al.*	In Equity. No. 787. Intervening Petition of O. B. Headrick.

Came Frederick P. Olcott, Charles M. McGhee, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, and pray an appeal by certificate of division to the next term of the Supreme Court of the United States, at Washington, D. C., from the action of the court in entering judgment for the intervening petitioner upon the trial and argument of this cause; and said appeal is granted upon appellants giving bond and security for judgment,
13 damages, and costs within thirty days from this date. Upon said bond being filed it will operate as a supersedeas.

14 UNITED STATES OF AMERICA,
Eastern Dist. of Tenn., Northern Division.

CENTRAL TRUST COMPANY OF NEW YORK *vs.* 1, EAST TENN., VA. & GA. R. R. COMPANY; 2, The Tenn. State Line R. R. Company; 3, Samuel Thomas, Defendants.	In Equity. No. 787. Intervening Pet'n of *of* O. B. Headrick.

Know all men by these presents that we, Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, as principals, and Wm. M. Baxter, as surety, are jointly and severally held and firmly bound unto O. B. Headrick, the intervening petitioner herein, in the sum of seven hundred & fifty dollars, to be paid to the said O. B. Headrick and his heirs and assigns; for which payment, well and truly to be made, we — each of us binds himself, his heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this — day of July, 1888.

Whereas lately, at a regular term of the circuit court of the

United States for the eastern district of Tennessee, begun and held at the city of Knoxville, within said district and the sixth circuit, on the 9th day of July, A. D. 1888, the said petitioner recovered judgment against the defendants; and whereas an appeal from said judgment by certificate of division was prayed by said Frederic P. Olcott and others to the Supreme Court of the United States, which appeal was granted: Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all costs, if they fail to make their appeal good, then the above obligation to be void; else to remain in full force and virtue.

FREDERIC P. OLCOTT, [SEAL.]
By WM. M. BAXTER, *Att'y.*
15 CHARLES M. McGHEE, [SEAL.]
By WM. M. BAXTER, *Att'y.*
FREDERICK D. TAPPAN, [SEAL.]
By WM. M. BAXTER, *Att'y.*
GEORGE WARREN SMITH, [SEAL.]
By WM. M. BAXTER, *Att'y.*
EDMUND W. CORLIES, [SEAL.]
By WM. M. BAXTER, *Att'y.*
WM. M. BAXTER. [SEAL.]

Approved as bond for costs and supersedeas.
HOWELL E. JACKSON.

16 UNITED STATES OF AMERICA, }
Eastern District of Tennessee, } *ss:*

I, H. H. Taylor, clerk of the circuit court of the United States for said district, do hereby certify that the foregoing pages, numbered from 1 to 15, inclusive, contain full, true, and perfect copies of the judgment, certificate of division, appeal, and appeal bond on the intervening petition of O. B. Headrick, in the case of The Central Trust Company of New York against The East Tennessee, Virginia and Georgia Railroad Company *et al.*, as the same appear of record and on file in my office.

Witness my hand and the seal of said court, at office, in Knoxville, Tennessee, this 3rd day of August, 1888.

[The Seal of the Circuit Court, District of East Tenn.]

H. H. TAYLOR, *Clerk.*

Endorsed on cover: E. Tennessee C. C. U. S. No. 77. Frederic P. Olcott, Charles M. McGhee, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, appellants, *vs.* O. B. Headrick. Filed August 16, 1888.

Office Supreme Court U. S.
FILED,
OCT 22 1891
JAMES H. McKENNEY

SUPREME COURT OF THE UNITED STATES.

FREDERIC P. OLCOTT *et als.*,	IN SUPREME COURT OF
APPELLANTS,	UNITED STATES.
vs.	OCTOBER TERM, 1891.
O. B. HEADRICK.	No. 77.

IN ERROR TO THE CIRCUIT COURT OF UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION.

BRIEF FOR APPELLANTS.

WM. M. BAXTER,
SOLICITOR.

KNOXVILLE, TENN.:
S. B. NEWMAN & CO., BOOK AND JOB PRINTERS.
1891.

FREDERIC P. OLCOTT *et als.*,	IN SUPREME COURT OF
APPELLANTS,	UNITED STATES.
vs.	OCTOBER TERM, 1891.
O. B. HEADRICK.	No. 77.

STATEMENT OF CASE.

Under a bill to foreclose a general mortgage upon the property of the East Tennessee, Virginia & Georgia Railroad Company, Henry Fink was, on January 6th, 1885, appointed receiver and put in possession.

On the 18th day of March, 1886, a decree of foreclosure and sale was pronounced in which it was provided: "And the purchaser or purchasers of said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy and discharge any and all claims now pending and undetermined in either of said courts, accruing prior to the appointment of the receiver herein, or during the receivership, which may be allowed and adjudged by this Court as prior in right to said respective mortgages, together with such interest as may be allowed, except as to mortgages prior to said mortgages foreclosed in this suit, and subject to which said property shall be sold; and also upon the further expressed condition that he or they will pay off,

satisfy and discharge all debts, claims and demands of whatsoever nature, incurred or which may hereafter be incurred by said receiver, Henry Fink, and which have not been or shall not hereafter be paid by said receiver or other parties in interest herein; and said purchaser or purchasers, their successor or successors or assigns, shall have the right to appear and make defense to any claim, debt or demand sought to be enforced against said property; and said purchaser or purchasers, their successor or successors or assigns, shall also have the right to enter appearance in this or any other Court and contest any claim or demand pending and undetermined at the date of the confirmation of such sale. All claims, debts and demands accruing during the receivership herein shall be barred, unless presented, as herein provided, within six months after the confirmation of said sale; and jurisdiction of this cause is retained by this Court for the purpose of enforcing the provisions of this article of this decree."

On the 25th day of May, 1886, a sale of the mortgaged property was made by the Special Master appointed to make the same, and he reported as follows: "In obedience to the decree entered herein on the 18th day of March, 1886, and the supplemental decree dated the 26th day of April, 1886, entered in the above cause, and the order dated May, the 19th, 1886, the undersigned, as Special Master, begs leave to report that after having advertised, as required by said decrees, he did, on the 25th day of May, 1886, expose all of the said property described in said decrees and in the mortgage sought to be foreclosed in said suit to public sale, at the door in front of the Custom-house building, in Knoxville, Tenn., upon the terms and conditions described in said decrees. At said sale the said property, as described in said decrees and mortgages, was bid off by Frederic P. Olcott, Charles M. McGhee, Robert Fleming, Frederick D.

Tappan, George Warren Smith, and Edmund W. Corlies, for the sum of ten million two hundred and fifty thousand dollars, of which sum one hundred thousand dollars was paid him in cash, in hand; and the same is subject to the order of the Court." On June 28th, 1886, a decree confirming the sale was entered reciting that "this cause came on further to be heard upon the application of the complainant, the Central Trust Company of New York, to confirm the sale made under the decree and supplemental decree herein on the 25th day of May, 1886, by Wm. Rule, Esq., Special Master, appointed for the purpose by the said decree of this Court, to Frederic P. Olcott, Charles M. McGhee, Robert Fleming, Frederick D. Tappan, George Warren Smith, and Edmund W. Corlies, acting as committee on behalf of the bondholders, as purchasing trustees; and upon producing the report of said sale made by the said Special Master, which was filed on the 26th day of May, 1886, and no exceptions to said report having been filed, and sufficient notice of the hearing of the said application having been given to the solicitors of the parties to this cause, and the Court having fully examined the report of the sale of the said Special Master and his doings in pursuance of the decree of sale herein, and finding the same correct and in all respects in conformity to law and with the orders and decrees of this Court, it is now, therefore, ordered, adjudged and decreed that the said sale be, and the same is hereby ratified, approved and confirmed in all respects, and the said report of sale made by the said Special Master in that regard be, and the same are hereby, in all respects, approved and confirmed."

On the 2nd day of March, 1887, O. B. Headrick filed his intervening petition for the recovery of damages for personal injuries, alleged to have been received on the 30th day of March, 1886.

It will thus be seen that the alleged injury happened about the time of the decree of foreclosure and sale, and that the petition was filed just in time to save the claim from the bar of the Tennessee statute of *one year* for personal injuries. *Code of Tennessee* (M. & V.) section 3469.

The purchasers of the mortgaged premises plead in bar to this petition, that under the terms of the decrees of sale and confirmation, this claim was barred.

The facts raising this issue were undisputed, but the plea was disallowed, and the Circuit Judge entered judgment for the intervenor. The District Judge not agreeing with him, a certificate of division was signed, and the cause is here upon that certificate, by *writ of error*.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in holding that the intervenor was not barred by the decrees of sale and confirmation.

2. The Circuit Court erred in changing the terms upon which the purchasers bought and held the mortgaged premises.

3. The Circuit Court erred in not dismissing the intervening petition.

4. The Circuit Court erred in pronouncing judgment in favor of the intervenor and against appellants, and awarding execution against them.

BRIEF.

1. It is respectfully submitted that Courts of Equity in the administration of insolvent estates have the power to fix a reasonable time within which creditors must file their claims.

This right must be conceded in order to enable them to

wind up the estate and distribute the assets. The practice of doing so in foreclosing railroad mortgages is common, and the right to do so has passed unchallenged in this Court.

Union Trust Company vs Morrison, 125 U. S. 521.

2. It is also common practice for the Circuit Courts to incorporate, in decrees of foreclosure and sale of railroad property, conditions or provisions that the purchasers shall assume and pay certain debts, claims or liabilities of the receiver, on the company whose property is sold; and it has been held that the purchasers are estopped to deny or question the binding effect or legality of such decrees.

17 Fed. Rep., 758.

28 Fed. Rep., 910.

The purchaser is only one party to the contract—the Court is the other. Estoppels are mutual. If the purchaser is estopped, so is the Court. The terms of sale were (touching this question) that the purchaser should pay, satisfy and discharge all claims, debts and demands, of whatsoever nature, incurred or which may hereafter be incurrred by the receiver, and which have not been or shall not hereafter by paid by him or other parties in interest, with the right given and reserved to the purchaser to contest any claim or demand pending and undetermined at the date of confirmation; and that all claims, debts and demands accruing during the receivership would be *barred*, unless presented in the foreclosure suit within six months after the confirmation of sale; and jurisdiction of the cause was retained for the purpose of enforcing this portion of the decree of sale, i. e., for the purpose of enforceing the contract between the Court and the purchaser.

This contract was accepted by the purchasers when they purchased the property and complied with the terms of sale; and the contract became *executed* and irrevocable, when the decree confirming the sale was entered.

Nevertheless, at the July term, 1888, the Court undertakes to make the purchasers liable for a claim or demand, upon an intervening petition, filed more than six months after the decree confirming the sale; thereby *enlarging* or *extending* the liabilities of the purchasers, and making them liable for a claim *expressly excluded* or *barred*, by the decree of sale, under which the property was sold to appellants.

It is respectfully submitted that this action of the Court cannot be justified either in law or reason.

Having made the contract with the purchasers, it is the Court's bounden duty to carry out its contract; and if it wants to decree in favor of claimants who may come in more than six month after the decree of confirmation, it should do so out of the general fund; or should have required such a *cash payment*, as would reasonably be sufficient, probably, to satisfy any meritorious claimant who *might* come in after "the eleventh hour." It is not good faith to the purchaser, to make him pay more for the property than he agreed, and more than the Court bound itself to accept.

The time fixed for bringing in such claims was extremely reasonable, fair and just; six months after confirmation of sale.

In a foreclosure of a road running and operating in four states, the fact of its being in the hands of a receiver, its sale, the new ownership etc., were and must be facts of such notorious nature as that the court can know, judicially almost, that every person having a claim against the receiver, knew and was bound to take notice of the time fixed within which claims against the receiver would be barred.

3. No sound argument can be predicated upon the recital in the degree of confirmation that it be recited in the *deed* to the purchasers, that they take the property subject to, "and that they assume and pay off all debts, claims and

"demands of whatsoever nature now pending undetermined "in either of the Courts in which the original and ancillary "bills in the cause are pending, which may be allowed and "and adjudged by this Court or either of said Courts where "ancillary bills are pending, as prior to any right secured "under the said consolidated first mortgage, under the "foreclosure of the said sale as made, and subject likewise "to all debts, claims and demands of whatsoever nature, "incurred by Henry Fink, as receiver in this cause and "which may remain *unpaid* at the termination of said "receivership." (Record, p. 5.)

The liability of the purchasers is fixed by the decree of sale and the Master's offer and sale in accordance therewith and the decree confirming all his acts and doings in the premises, *and not by the deed*, which he was directed to make to the purchasers. It is not sought to hold them under the *deed*. *Again*, a proper construction of the paragraph quoted would be that, the purchasers were only bound for the *liquidated* debts, claims or demands of the receiver; *because* they are referred to as remaining *unpaid*. This cannot reasonably refer to *unadjudged* and *unliquidated* claims. Then again, the paragraph was *mere repetition* of the verbiage of the decree of sale, and as applicable to the *deed to be made*, the provision as to time within which claims against the receiver should be filed in the cause, had no place and would have been improper.

This case is not analogous to that of a creditor of an insolvent estate, who comes in *before* final distribution.

The decrees extracted from show that, final distribution of the estate had been had. It simply presents the question, whether Courts of equity and consience *are bound by their contracts*. This is a test case.

WM. M. BAXTER,
Solicitor for Appellants.

Office Supreme Court U. S.
FILED,
NOV 4 1891
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

FREDERIC P. OLCOTT *et als*,	IN SUPREME COURT OF
APPELLANTS,	UNITED STATES.
vs.	OCTOBER TERM, 1891.
O. B. HEADRICK.	No. 77.

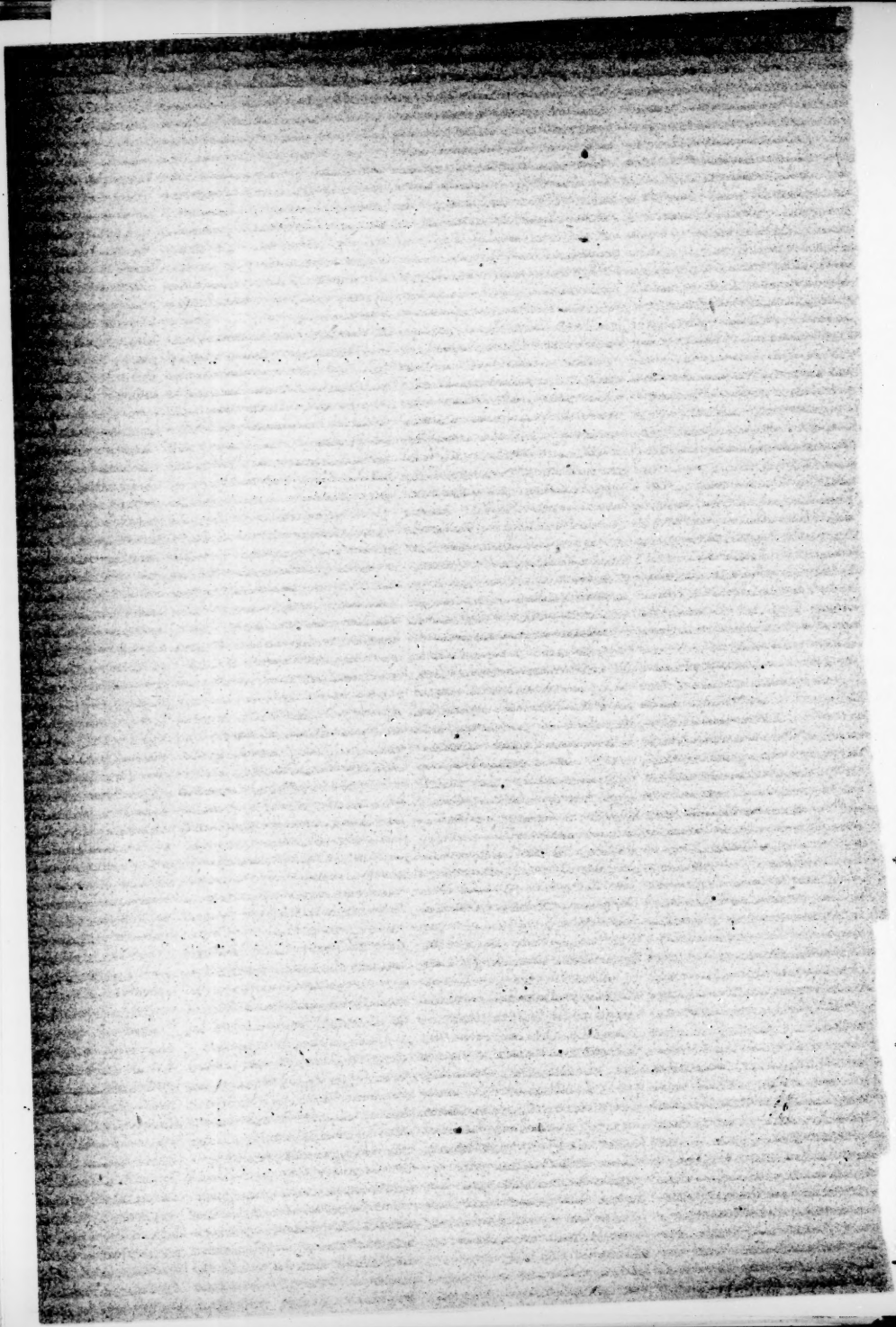
IN ERROR TO THE CIRCUIT COURT OF UNITED STATES
FOR THE EASTERN DISTRICT OF TENNESSEE,
NORTHERN DIVISION.

APPENDIX

TO BRIEF OF WM. M. BAXTER, SOLICITOR FOR APPELLANT.

OPINION OF JUDGE D. M. KEY, JUDGE, &c.

KNOXVILLE, TENN.:
S. B. NEWMAN & CO., STEAM BOOK AND JOB PRINTERS.
1891.



O. B. HEADRICK vs. E. T., Va. & Ga. R. R.

In this case, as in several others, a motion to dismiss the suit because it had not been commenced within six months after the confirmation of the sale of the property of the Railroad Company, was overruled by the Circuit Judge, but the Defendants were granted leave to rely upon the grounds of the motion as a defense in their answer. They have done so, and the question has again been argued.

The decree ordering the sale, after requiring that the property should not be sold for less than ten millions of dollars, of which at least one hundred thousand dollars should be paid in cash, provides thus: "The purchaser or purchasers of the said property at said sale shall, as a part of the consideration of the purchase, and in addition to the sum bid, take the said property upon the express condition that he or they will pay off, satisfy and discharge any and all claims now pending and undetermined in either of said courts, accruing prior to the appointment of the Receiver herein, or during the Receivership, which may be allowed and adjudged by this Court as prior in right to said respective mortgages, together with such interest as may be allowed, except as to mortgages prior to said mortgages foreclosed in this suit and subject to which said property shall be sold; and also upon the further express condition that he or they will pay off, satisfy and discharge all debts, claims and demands of whatsoever nature incurred or which may hereafter be incurred by said Receiver, Henry Fink, and which have not been, or shall not hereafter be

paid by said Receiver or other parties in interest herein. All claims, debts and demands accruing during the Receivership herein shall be barred unless presented as herein provided within six months after the confirmation of said sale. And jurisdiction of this cause is retained by this Court for the purpose of enforcing the provisions of this article of this decree."

The Court says to and promises the purchaser or purchasers substantially, "If you bid and become the purchaser of the property sold you will not and shall not be required to pay *any claim, debt or demand* accruing during the Receivership unless such *claim, debt or demand* shall be presented here within six months after the sale shall be confirmed; and that you may rest assured of this matter the Court retains jurisdiction for one purpose only, and that is to *enforce* this, together with the other provisions embraced in this article of the decree. The question of liability, unless they were so presented, was settled, and could not be changed at a subsequent term without the consent of the purchaser, and certainly not as contended without bad faith in changing the terms of the sale so as to make terms more unfavorable to him than those upon which he purchased. A court would not tolerate such conduct in a vendor at a private sale. The decree of sale was filed March 18, 1886. On the 26th of May following, the Special Master filed his report of sale, in which he says that he sold said property as directed in the decree of sale, "*upon the terms and conditions prescribed in said decree*," to the purchasers for $10,250,000, of which $100,000 were paid in hand.

The purchasers did on their part what the decree required. They bid ten millions and upward for the property, paid $100,000 cash, and offered to discharge the residue of the bid as the decree authorized, and in addition undertook to pay the liabilities already stated, but the Master said to

them as the Court had said to them, "This sale is upon the *express* condition that you shall pay no debt, claim or demand already incurred, or which may hereafter be incurred by the Receiver, unless it has been presented already, or shall be presented in six months after the confirmation of this sale, and the Court has decreed that this condition shall be enforced." And on the 28th June, 1886, the Court met and the cause came on for hearing upon this report of sale, and the decree then pronounced tells us that "no exceptions to said report (of sale) having been filed * * and the Court having fully examined the report of the sale of the said Special Master and his doings in pursuance of the decree of sale herein, and *finding* the same *correct* and *in all respects* in conformity to law, and with the *orders* and *decrees* of this *Court*, * * * it is now therefore ordered, adjudged and decreed that the said sale be, and the same is hereby ratified, approved and confirmed in *all respects*, and the said report of the Special Master and all the proceedings of the said Special Master in that regard be, and the same are hereby in all respects approved and confirmed." So far the parties and the Court are at a good understanding. There is no room for difference. But it is said that at this point, without exception to the terms offered or accepted, or any objection on the part of any one to any of the terms and conditions of the sale, and after all had been ratified and confirmed by the Court, the Court stepped in and changed the terms of the sale, by requiring the purchasers to "pay all debts, claims and demands of whatsoever nature, incurred by Henry Fink as Receiver in this cause, and which may remain *unpaid* at the termination of said Fink's receivership."

This provision, it is insisted, is without limitation, restriction or exception, other than that the claim shall be unpaid.

If this position be true, no statute of limitations could bar a claim or demand incurred by the Receiver. Suppose a claim was made for personal injuries suffered or inflicted more than twelve months before the claim was presented; and the statute of limitations were pleaded, under the construction urged, it would be said that defense is not of any avail, for the decree of the Court stipulates that all claims, debts and demands which remain unpaid at the termination of the Receivership shall be paid by the purchasers, whether barred by the statute of limitations or not. No saving of the statute is made and the debt is not paid. The true construction of the decree must be that which is in harmony with law, and consistent and accordant with what has been decided and determined in the previous decrees, unless such construction cannot be made without distorting the terms or violating the language of the decree; and when this decree provides that all the claims that remain unpaid shall be liquidated by the purchasers, a fair interpretation of the decree is that this provision applies to such claims only as are legally due under the law and the adjudications and limitations already made in the cause, and not to all unpaid debts.

The Court had no authority to render such a decree as petitioner insists this is after what had gone before. It would be a startling doctrine to assert and maintain that a Court covertly in a decree might impose terms in executing its decrees different from the real contracts made under its stipulations and authority, when no party to the cause, or any one interested in the subject matter of the decree, or the purchasers under its sale—when no party or person, sought, desired or asked for such change, and after all the terms had been prescribed and accepted.

If I were to decide this litigation, I should dismiss the suit as having been brought too late, but the Circuit Judge

appears to have been inclined to a different view of the matter. I shall, therefore, pronounce no judgment in this case or in those similarly situated, but shall leave them for the decision of the Circuit Judge, or for a certificate of division of opinion, as he may elect. Therefore, no order will be made in the cases referred to until other and further directions are given.

KEY, J.

UNITED STATES OF AMERICA, }

EASTERN DISTRICT OF TENNESSEE. }

I, H. H. TAYLOR, Clerk of the Circuit Court of United States for the Eastern District of Tennessee, do certify that the foregoing is a full, true and perfect copy of the opinion of Judge D. M. KEY, now remaining on file in my office, in the case of the Central Trust Company of New York *vs.* East Tennessee, Virginia & Georgia Railroad Company *et al.*, wherein Henry Fink was Receiver, and in which O. B. Headrick filed an intervening petition for damages for personal injuries, and in which also Frederic P. Olcott and others became purchasers at the foreclosure sale made in said cause by Wm. Rule, Special Master, on the 25th day of May, 1886. Said opinion was filed January 30, 1888.

Given under my hand and seal of office, at Knoxville, this 2nd day of November, 1891.

Clerk, &c.

FILED.
NOV 2 1891
JAMES H. MCKENNEY
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 77.

FREDERIC P. OLCOTT, *et al.*, *Appellants*,

vs.

O. B. HEADRICK.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF FOR APPELLEE.

HENRY H. INGERSOLL,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 77.

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vs.

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Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF FOR APPELLEE.

The Appellants statement of the case is defective in that

(1). It fails to show that this suit was brought pending Receivership against the Receiver, and was defended by him, and judgment was rendered against him. (Tr. p. 1).

(2). It omits that clause of the decree of confirmation upon which Appellants were held liable, which is as follows: "It is further ordered, adjudged and decreed that the said purchasers shall take the said property, and that it be recited in said deed that they do take the property subject to, and that the said purchasers assume and pay off, any and all debts, claims and demands of whatsoever nature now pending and undetermined; * * * * * * * * * * * and subject likewise to all debts, claims and demands of whatsoever nature incurred by Henry Fink, as Receiver in this cause, which may remain unpaid at the termination of said Fink's Receivership." (Tr. p. 5).

This decree was submitted to by Appellants without exception, complaint or appeal, and stood at the time Appellee filed his

petition and obtained his decree, and still stands, unreversed and unappealed from. It is Appellants only muniment of title to the railroad property. They seem to have bought the entire road with all its assets and credits as a going concern, and to have assumed all its liabilities contracted or incurred after it was put into the hands of a Receiver.

For Appellee my contention is:

I.

Appellants are bound under the decree of confirmation to pay off "all claims and demands of whatsoever nature incurred by the Receiver."

Not only does their deed to the property recite that they have assumed to pay these debts, but the very decree of confirmation itself, whereby alone they obtain title to the property, declares that they shall take it subject to all claims and demands against the Receiver; and whatever may have been the terms of the order of sale or of the Master's offer thereunder, this decree of confirmation is conclusive upon the purchasers.

A sale by a Master is not complete till confirmed by the Court.

2 Dan. Chan. Pldg. & Pr. p. 1281.
Camden vs. Mayhew, 129 U. S. 80.
Childress vs. Hurt, 2 Swan. 491.
Atkison vs. Murfree, 1 Tenn. Chy. 54.

And the acceptance or rejection of a bid at a Master's sale is within the discretion of the Court.

Camden vs. Mayhew, 129 U. S. 73.

If Appellants were dissatisfied with the terms and conditions of the sale as expressed by the Court in the completion thereof by the decree of confirmation, it was their privilege to object to the terms imposed, and to ask the Court to be relieved from them; and if they could not obtain relief from the Circuit Court the right of appeal to this Court to correct the error (if any there were), was open to them.

A bidder at Master's sale may appeal from the decree of Court confirming, modifying or setting aside the sale.

Blossom vs. M. & C. R. Co., 1 Wall. 655.
Souter vs. M. & M. R. Co., 5 Wall. 662.
Sage vs. Central R. Co., 96 U. S. 714.

But having waived this privilege and right, and having submitted without complaint or objection to the decree they cannot now be heard to complain of its terms—they cannot now ask the Court to relieve them from its burdens. Indeed, they have not made request to be relieved—they merely object to the terms of that decree two years after it is made, and complain that the Court has not dealt fairly with them in making such decree, and ought, in the completion of the contract, to have followed literally the terms of the preliminary negotiations. This objection and complaint was and now is irrelavant.

Purchasers at judicial sale cannot attack the decree of confirmation collaterally.

Griffith vs. Bogart, 18 How. 164.
Grignon vs. Aston, 2 How. 342.

II.

Appellee's judgment is a claim and demand incurred by Henry Fink, Receiver, and is therefore within the express terms of the decree.

That language is: "All debts, claims and demands of whatsoever nature incurred by Henry Fink, Receiver, which may remain unpaid at the termination of said Receivership." "Whatsoever" is a word of broadest import; and is defined: "Anything, be it what it may;" and is as certainly inclusive of unadjudged and unliquidated claims as of any other kind.

Nor can the word "unpaid" limit the claims assumed to such merely as were in judgment. It is probable—almost certain indeed—that thousands of claims by connecting roads on account of traffic balances arising during the receivership were assumed and paid by these purchasers without ever being heard of in a court of justice.

Certain it is, this claim of Headrick's was incurred by Henry Fink, Receiver, and was *unpaid* by him; it is of "whatsoever nature," and therefore Appellants are liable for it under the terms of the decree of confirmation.

III.

A Court of Equity, whether State or Federal, has no power to shorten the period of limitation for bringing an action against its Receiver.

Concede that this effect is often produced by the discharge of Receivers, or by the closing of the receivership, by the final distribution of funds, or by final decree disposing of the cause in which suits might be brought against the Receiver, and thus, practically, parties are often deprived of a substantial remedy before the expiration of the time limited by law; and yet this case is not affected by the concession. This receivership was not terminated. This Receiver had not been discharged. This fund had not been finally distributed, nor had this cause gone off the docket; but all the conditions existed, under which Appellee was entitled, in due course of law, to present this claim to the Court in this cause. Cause, wrongdoer, fund, were all before the Court. The claim was valid and just, and not barred by any statute of limitations. Under such circumstances the Court could not lawfully refuse to allow the claim, merely because not presented within the time prescribed therefor by order in the cause. Such refusal would amount to a denial of justice! It would exempt great corporations in the hands of Receivers from the operation of laws controlling and binding all other members of society! Such an order could not lawfully be made with regard to any solvent person or corporation. A statute enacted by a State Legislature prescribing one rule of limitation for a railway corporation and another for other persons would be unconstitutional and void. May a Court by general order do what the Legislature might not do by general law, and thus deprive citizens of the equal protection of the law, and deny them redress for injuries by due process of law? An examination of the cases and analysis of the situation will demonstrate that the accident of insolvency, and the

convenience of administration alone give color of right to such judicial orders; and they are allowed to have the effect of depriving citizens of their equal rights—if at all—only when in the expedition of administration both parties and funds have passed beyond the control of the Court. In such cases the Court does not deny relief, much less does it deny the right of the party to sue. It merely declines or fails to give redress, because parties and funds have gone beyond the control of the Court; but sometimes it will recall them even then.

Williams vs. Gibbs, 17 Howard, 239.

Here no such conditions exist; and therefore Appellants being before the Court with the funds in their hands, provided and promised for the payment of this claim, are in no situation to deny Appellants right to sue within twelve months, nor to insist upon the application of a rule of practice in derogation of common right, in the absence of those conditions which alone excuse or warrant such extraordinary practice.

IV.

This case is analagous to that of a creditor of an insolvent estate who comes in before final distribution—indeed it is the very case itself.

Headrick brought this suit against Fink, Receiver, while he was yet in office. Fink, Receiver, defended, and judgment was rendered against Fink, Receiver, in the first instance; but because he had been discharged from further liability in the cause and the purchasers had assumed his liabilities, therefore it was decreed that they should pay to Headrick the sum of $500, as aforesaid. (See Tr. p. 1).

It is the practice of Courts of equity, sanctioned by long usage to admit creditors of insolvent estates, whether of person or corporations, to participate in the distribution of the fund; provided they present their claim before final distribution of estate is made, notwithstanding they may come in after the time limited by the Court for the filing of claims. Since this limitation is arbitrary, and made merely for expedition in administration, this indulgence to belated creditors is within the discretion of the Court, and will

not be revised in the Court of Appeals, unless it appears affirmatively, that there has been an abuse of this judicial discretion; for which there is no contention in this cause.

That such is the general practice in insolvent cases see:

Brooks vs. Gibbons, 4 Paige, 379.
Burchard vs. Phillips, 11 Paige, 70.
Grinnell vs. Mer. Ins. Co., 1 C. E. Green, 283.
Lashley vs. Hogg, 11 Vesey, 602.
Hurley vs. Murrell, 1 Tenn. Chy., 626.

Here was an insolvent railroad operated by a Receiver, and an injured passenger with a right to sue at any time within twelve months. Here was a fund under the control of Court, the property of the insolvent railroad in the hands of a Receiver, and primarily liable to the satisfaction of this passenger's demand. Here were the purchasers of the railroad property, who, to avoid either the trouble, or the delay, or the exposure of accounts incident to Receiver's settlements, assumed all his liabilities "of whatsoever nature" and without limitation, other than such as the law imposed. Even the decree of sale did not contain as part of its terms, the six months limitation of liability. That portion of that decree which Appellants insist upon as contractual provided that the purchaser should "pay off, satisfy and discharge all debts, claims and demands of whatsoever nature incurred by Receiver Henry Fink"—not such only as should be presented within six months from confirmation of sale.

Appellants might *consider* this six months order in making their purchase; but they could not *rely upon* it as a part of the contract of purchase. It does not purport to be such in terms; and it is only the conventional order usual in such cases, subject to modification at the discretion of the Court. As such only had they the right to consider it. It was not a stipulation of the contract, either in terms or by legal intendment, which the Court was estopped to vary, but rather precisely the contrary. And as they could not and did not plead it against the Court at the confirmation of the decree, much less have they a right now, after acquiescing in the decree, to plead it against Appellee who was no party to their contract or purchase. He insists upon the law

of his State allowing him twelve months in which to sue, and upon the promise of Complainants in the decree of confirmation, and in the deed under which they hold the property, that they would pay his claim, and upon the discretion of the Court in varying the terms of the order prescribing the limit of filing claims against the Receiver, and allowing him to assert his claim herein, as conclusive against Appellants.

The appearance of the Receiver, and of the purchasers, with the funds in their hands, the presence of the cause upon the docket, and the order and decree of the Circuit Judge, requiring of the said purchasers, compliance with their promise to the Court as a condition of taking and holding the railroad funds and property, are a complete and satisfactory answer to Appellants' contention.

V.

Appellants are estopped to deny their obligation.

Even if the Court had the power in the order of sale to limit the right of persons to sue the Receiver for personal injuries to a shorter period than that allowed by general law, and such was the effect of the clause in the order of sale, it is a sufficient answer to Appellants' contention upon this point to say: that the terms of the original proposition of sale were modified in the decree of confirmation, and the judicial limitation of actions was abandoned, and the purchasers, who assumed the liabilities, were onerated with *all legal "claims and demands of whatsoever nature,"* and that this modification of the contract was within the power of the parties making it, and was agreed to by Appellants without complaint, and was so expressed in the final consummation of the contract; it is now too late to fall back upon the *original* propositions of contract and to deny obligations voluntarily and solemnly assumed in the completion thereof.

Appellants on elementary principles, are estopped from denying that they are bound by the terms of this decree. Appellee, with notice that they had assumed the liability of Receiver Fink to him, and that by the very terms of the decree under which they held the property there was no limitation save that of gen-